pleasurable and restful for him to make the journey in that car. It was contended for the claimant that one should look at the journey objectively, that the purposes for which the car was then being used should be contrasted with the object of the journey and that provided the car was, at the time, being used for the purpose of pleasure, it did not matter that it was also being used for other purposes. It was held, however, that it would be giving an unnatural use to words to hold that the journey was for social, domestic or pleasure purposes.

Mr. Rawson, for the plaintiff, submitted that in considering the liability of an insurance company under an insurance policy the question is whether the use of the vehicle is covered by the policy and not whether the driver is covered, and in support of this submission he referred to *John T. Ellis, Ltd. v. Hinds*[4], which was followed in *March v. Moore & Anor.*[5]; that case laid down that a policy of insurance is in force in relation to the user of a vehicle if the owner's liability for accidents is covered by an insurance policy. Lord Goddard C.J. said at p. 339 :—

> "No doubt, the owner of the car who drives himself uses the vehicle but so he does if it is driven on his account by his servant. A person who rides in his car while it is being driven by someone else, or who sends his driver out with his motor vehicle on business, uses, but does not drive, the vehicle."

The learned Counsel for the plaintiff also submitted that Lee Ngiow was the agent of Wong Shin, the policyholder, if not in the full legal sense within the decision in *Ormond v. Crosville Motor Services Ltd.*[6].

In a case of claim for damages against an insurance company the question to be decided is, in my opinion, whether the policy covers the use which the insured was making of the motor-car at the time of the accident; and subject to any limitation in the policy, it is immaterial whether the motor-car was then being driven by the insured himself, or by his servant or agent or with his permission, or whether the insured is at the time in the car or not.

It is not contested that Lee Ngiow was driving with the permission of the policyholder Wong Shin and the only question, therefore, is whether at the time of the accident the use of the jeep was in connection with the motor trade of Lee Ngiow or for the policyholder's business. It cannot be denied that the repairing of the jeep and the testing of it before returning it to the owner were part of the garage proprietor's business; the repairs to the jeep would be to the benefit of that business and it is only in that sense that it can be said that the jeep was being used "for any purpose in connection with the motor trade". But can it be said that the policyholder was using or allowed or permitted the use of the jeep for any such purpose? The answer in my opinion is clearly in the negative; the policyholder wanted the jeep for his business, he was going next day to Penang on business and naturally he wanted the jeep in good running order; after the repairs had been effected by the garage he wanted to be sure that it was in good running order and for this purpose he gave authority to the garage proprietor to test the jeep; and at the time of the accident the garage proprietor was using the jeep for and on behalf of the policyholder and therefore for the purposes of the policyholder. If the policyholder himself had carried out the test after the repairs had been completed, I do not think that there could be any doubt that the jeep was not being used in connection with the motor trade and I can see no difference between the policyholder carrying out the test himself and authorising or giving permission to somebody else to use the jeep for the purpose of testing it for him. If, while the garage proprietor had the custody of the jeep, he had used it for the purpose of an emergency call made to his garage to attend to a broken down car of one of his customers and an accident occurred while the jeep was being used for this purpose then that would clearly be use in connection with the motor trade, and as in the case of *Gray v. Blackmore*[7] the policy would not cover such use.

For the above reasons I held that at the time of the accident the jeep was not being used outside the limitations as to use in Policy No. 352543 issued to Wong Shin by the defendant company and that the defendant company is liable.

Judgment for the plaintiff in $18,000 the costs in Civil Suit No. 648 of 1953, with costs in this suit.

Order accordingly.

Solicitors : *Shearn, Delamore & Co.; S. M. Yong & Co.*

OEI SIOE NEO v. YEAP KIM HOE

[O. C. J. (Spenser-Wilkinson J.) April 13, 1956]

[Penang — Summons-in-Chambers No. 16 of 1956]

Rules of the Supreme Court, O. 28, rr. 11 & 15 and O. 63 — Judgment in default of appearance — Nullity — Irregularity — Discretion of Court to set aside irregular judgment.

This was an application to set aside a default judgment on the ground (1) that it granted relief not asked for in the writ of summons; (2) that it was entered for too much.

Held: (1) the claim in the writ in this case was sufficiently wide to cover the terms of the judgment and the judgment was therefore not irregular;

(2) even if it was shown that the judgment was irregular, the Court would not in this case have exercised its discretion to vary the judgment.

Cases referred to :—

(1) *Hughes v. Justin* (1894) 1 Q.B. 667.

(2) *Muir v. Jenks* (1913) 2 K.B. 412.

(3) *Gee v. Bell* 35 Ch. D. 160.

(4) *Kingdon v. Kirk* 37 Ch. D. 141.

(5) *Law v. Whilby* 61 L.T. 522.

(6) *Craig v. Kanseen* (1943) 1 All E.R. 108.

(7) *Anlaby b. Praetorius* 20 Q.B.D. 764.

(8) *Evans v. Bartlam* (1937) 2 All E.R. 646.

ACTION.

R. H. Green (*I. K. Meek* with him) for the plaintiff.

L. A. J. Smith (*G. H. Goh* with him) for the defendant.

Spenser Wilkinson J. : — The Writ of Summons in this action was issued on the 23rd July, 1953. No appearance was entered and on the 26th October, 1953 the Statement of Claim was filed. On the 16th November, 1953 the plaintiff moved for judgment under Order 28 Rule 11 (which is the same as English Order 27 Rule 11) and judgment was given in terms of a draft submitted by plaintiff's Counsel. The judgment is a long one and I need only refer to those of its terms which have been under discussion in the course of the present application.

In February, 1954 the defendant entered an unconditional appearance. Whether or not he was entitled to do this without leave is not clear. It may be that he ought to have followed the English Chancery practice of applying for leave to enter appearance after judgment and had he done so the questions now raised would no doubt have been decided then and there; for either the judgment would have been set aside or amended or the defendant would have had to submit to be bound by it. (See *Daniel's* Chancery Practice, pages 295-296). There is as far as I am aware no local authority on this point but as no objection has been taken I shall assume that this entry of appearance after judgment was in order.

Subsequently, the rights of other persons not parties to the Suit being affected, leave was obtained for those persons to intervene, and two sets of issues were settled and ordered to be tried with pleadings. The defendant was a party to one of these sets of issues which was heard in open Court and judgment reserved. The other issue was to some extent partheard and at that stage the parties reached an amicable settlement of all issues involved which were thereupon settled upon terms which were recorded.

On the 14th January, 1956 the defendant took out the present application which seeks to set aside or vary the judgment and the matter was adjourned into open Court for argument. The application is framed with two alternative prayers, the first being that the judgment be set aside and the second that it be varied in certain respects set out in the application.

Both prayers of the application are based upon the same two grounds. It is contended first that the judgment was a judgment in default and granted relief which was not asked for in the Writ of Summons; and secondly that the judgment was entered for too much. I think it will be convenient to deal first with the second prayer of the application and consider the various respects in which it is suggested that the judgment, if not set aside, should be varied.

The judgment refers in paragraphs 2 and 3 to an Indenture dated the 1st September, 1944. This Indenture, although its terms and effect are set out in paragraph 10 of the Statement of Claim, is nowhere mentioned in the Writ of Summons. It is contended, therefore, that the declaration in the judgment to the effect that under this Indenture the defendant is a trustee for the plaintiff and the trusts thereof ought to be carried out is something that goes right outside what is claimed in the Writ of Summons.

Although at first sight this contention appears to have some force I am of opinion that there is really no substance in it. The Indenture of the 1st September, 1944 was followed by a later Indenture between the parties dated the 26th June, 1945 which deals with the same property in the same terms, the only difference being that instead of dealing, as the first Indenture does, with half of a half share in the property it deals with the whole of a half share. In effect, therefore, the first Indenture merged, as it were, in the later one and when the Writ claims a declaration of the validity of the trusts declared by the later Indenture this claim must automatically include a claim for the same thing in respect of the trusts in the earlier Indenture. Again, where the Writ claims that the trusts of the June Indenture are to be carried into execution this necessarily and automatically involves carrying out the trusts of the earlier Indenture. The only reason for the mention of the first Indenture in the Statement of Claim and in the judgment is for the sake of completeness and in my opinion the claims in the Writ fully cover the reliefs sought for in the Statement of Claim and given in the judgment in respect of the properties, the subject matter of the Indenture of the 1st September, 1944.

The next complaint is in regard to an Indenture dated the 17th October, 1946. The terms of this Indenture are set out in paragraph 17 of the Statement of Claim, but it is nowhere mentioned as such in the endorsement on the Writ of Summons. This document was an assignment to the plaintiff by the defendant

upon certain trusts of his share in the business of the Ban Hin Lee Oil Mill. In the Writ of Summons the following reliefs are claimed in respect of the Ban Hin Lee Oil Mill :—

"5. (a) An account of the share of the Defendant in the profits of the partnership business of Ban Hin Lee Oil Mill from the 17th day of October, 1946.
(b) An enquiry.
(c) A receiver.
(d) An injunction.
(e) Such further and other relief as the nature of the case may require."

There are, it seems to me, two ways of framing a claim relating to a share in a business if there is a written document in existence — one is by reference to the document as such and the other by reference to the subject matter of the document. I think the fallacy underlying the applicant's contention in this case is the idea that one can separate a document from its terms. For example if under a written document A agrees to pay B $1,000 out of a particular fund then if a writ of summons is issued claiming payment of the $1,000 out of that fund then it seems to me that this is in substance the same thing as a claim that the terms of the document be carried out. I think the claim for the relief above set out is necessarily a claim under the assignment of the 17th October, 1946 and this appears to be made sufficiently clear by the fact that that is the date from which the account is claimed. Moreover, it seems to me that the declaration that any trust which may appear in the Indenture of Assignment ought to be carried into effect comes within the words of sub-paragraph (e) of this claim "Such further and other relief as the nature of the case may require".

It is said next that the enquiries ordered by paragraph 7 of the judgment are not consequential upon paragraph 3 of the endorsement on the Writ. I cannot accept this suggestion. One of the claims in that paragraph of the endorsement is for a declaration that the Indenture of the 12th December, 1946 (which relates to certain shares in the Ban Hin Lee Bank Ltd.) constitutes a good and valid trust in favour of the plaintiff and her children. There is also a claim to have the property, the subject matter of the Indenture, administered and the trusts thereof carried into execution. In my view the accounts ordered are a necessary corollary to the proper administration of the property.

Finally it is complained that paragraph 12 of the judgment gives liberty to the plaintiff to apply as to damages and to discharge the defendant from the trusts and it is said that there is no such prayer in the Writ. As regards the second part of this objection there is a prayer in paragraph 4 of the endorsement on the Writ for the removal of the defendant from his office of trustee and there is, therefore, no substance in this point. With regard to the liberty to apply as to damages it is argued that as the plaintiff has already been given her other remedies there is no room left for any question of damages. There are, it seems to me, two answers to this objection. In the first place liberty to apply as to damages is not in any sense a decision or any indication that damages will in fact be awarded; and secondly, in the working out of a complicated judgment like this it might well turn out that in certain events one of the remedies granted had proved ineffective and circumstances might arise in which it would be proper to grant damages in lieu of some other remedy. In my opinion this liberty to apply does not carry the plaintiff's claim beyond the relief claimed in the Writ.

With regard, therefore, to the first of the grounds stated in the Summons for setting aside or amending the judgment I hold that both parts of the application must fail because the judgment does not in substance give any relief which is not covered by what is claimed in the endorsement on the Writ of Summons.

Although Mr. Smith has argued that there is a distinction between claiming relief which is not asked for in the Writ and entering judgment for too much the second ground appears to me to be substantially the same as the first. It is put in the Summons-in-Chambers as follows :—

"(ii) that the said judgment was entered for too much, namely, for the execution of trusts alleged to be contained in the Indenture of 17th October, 1946 referred to in the said judgment when in fact the Plaintiff herself and not the Defendant is the sole trustee of such trusts."

I am unable to accept the general proposition for which Mr. Smith contended that a default judgment which gives relief in any respect beyond what is claimed in the Writ or a default judgment which is entered for too much, must necessarily be wholly set aside, particularly in Chancery cases such as the one now before me. The only decision which at first sight appears to lend some support to this wide proposition is the case of *Hughes v. Justin*[1]. That was a case, however, which appears to me to have depended peculiarly upon its own facts. The plaintiff there was not entitled to any judgment at all upon any part of his claim, which had been settled, but was possibly entitled to some costs. The decision went upon the view that the judgment signed was one which the plaintiff was not entitled to. I doubt very much whether the Court in that case intended to decide, or indeed did decide, that, where a money judgment is entered for a larger sum than the plaintiff is entitled to, the whole judgment must necessarily go, because there are other cases which suggest that in certain circumstances even a money judgment may be amended to

the correct figure. For example the headnote in *Muir v. Jenks*[2] reads as follows :—

"Where a plaintiff signs judgment in default of appearance for a sum in excess of that which is due to him, the defendant is entitled to have that judgment set aside, subject to the right of the plaintiff, in a proper case, to apply to have the amount of the judgment reduced."

Whatever the situation may be with regard to simple money judgments it seems quite clear to me from the cases of *Gee v. Bell*[3], *Kingdon v. Kirk*[4] and *Law v. Whilby*[5] that in Chancery cases, where judgment is entered for additional reliefs which are not claimed in the Writ of Summons, the only effect will be that the judgment will be limited to the relief claimed in the Writ by deleting that part of it which gives greater relief than the plaintiff under the Writ is entitled to. Even, therefore, if I thought that that part of the judgment which decrees the execution of the trusts in the Indenture of the 17th October, 1946 went beyond what was claimed in the Writ or to use the phraseology of the application "was entered for too much" I would not be prepared on this ground to set aside the whole judgment and would so far as necessary vary it.

I have come to the conclusion however that this judgment does not really give too much. All the judgment says with regard to the Indenture of the 17th October, 1946 is that the trusts thereof are to be carried out. In so far as the plaintiff herself may be said to be the sole trustee under this Indenture the declaration has no effect upon the defendant and he has no reason to complain; but in so far as by taking or retaining possession of any part of the trust property or by failing to account or otherwise he is preventing or has prevented those trusts being carried out then it is to that extent a judgment against him which in my opinion is covered by paragraph 5 of the endorsement on the Writ of Summons. It may be that the claim in the Writ is more clearly worded than the judgment, and I think that in this respect the wording of the judgment is perhaps open to criticism. I am inclined to think, however, that the claim in the Writ is sufficiently wide in regard to the subject matter of this Indenture to cover the terms of the judgment in this respect and that the judgment is not therefore irregular.

Mr. Smith relied very strongly on the case of *Craig v. Kanseen*[6]. In that case, after dealing with the distinction between what is a nullity and a mere irregularity, Lord Greene concluded that he was there dealing with a nullity because the summons upon which the order in question in that case was based had not been served. He goes on to say :—

"Apart from proper *ex parte* proceedings the idea that an order can validly be made against a man who has no notification of any intention to apply for it is one which has never been adopted in England."

The facts in that case are so far removed from the facts of the case now before me that I do not think that it is of much assistance to the applicant in this case.

I am quite satisfied that there is nothing in the present case which could bring this judgment in any way within the category of those judgments and orders which have been held to be nullities. The remarks of Fry L.J. in *Anlaby v. Praetorius*[7] in regard to irregular judgments being set aside *ex debito justitiae* appear to me quite clearly, in the context, to refer to judgments improperly obtained, and not to judgments obtained entirely regularly which may, through inadvertence, go somewhat beyond what is claimed in the Writ.

If the judgment is not a complete nullity then the applicant is thrown back either upon the discretion of the Court conferred by Order 28 Rule 15 (that is English Order 27 Rule 15) or upon Order 63 (that is English Order 70). If Order 28 Rule 15 covers the position then the case of *Evans v. Bartlam*[8] makes it clear that I have an unfettered discretion in the matter. From this point of view I would have no hesitation whatever in exercising my discretion against the applicant in view of his conduct since the judgment was delivered. There has in my view been unwarrantable delay in making this application; no merits of any kind have been shown in favour of the applicant; he has through his Counsel attended various interlocutory proceedings; and he has stood by and become a party to the settlement of two issues which, although no doubt they were to some extent issues separate from the matters dealt with in the judgment, were settled by the parties in the light of the existence of the judgment in question. Even, therefore, if that part of the judgment which orders the trusts of the Indenture relating to the Ban Hin Lee Oil Mill to be carried out goes technically beyond the wording of the Writ I would not under this Rule be prepared to set it aside or vary it.

If the application falls within Order 63 Rule 1 then it appears to me, without going into the questions of estoppel and of approbation and reprobation which were raised before me by the respondent, that the applicant is clearly barred from any remedy by the provisions of Rule 2 of the same Order, which reads as follows :—

"2. No application to set aside any proceeding for irregularity shall be allowed, unless made within reasonable time, nor if the party applying has taken any fresh step after knowledge of the irregularity."

Not only has the application not been brought within a reasonable time but also in my opinion various steps have been taken with knowledge of the alleged

irregularity. Mr. Smith has argued that any steps taken by the applicant were taken under compulsion and in so far as the filing of accounts may have been done under compulsion this is no doubt true. But there is no evidence that the unconditional appearance was entered under compulsion and it is to be observed that a letter was written to the defendant's Solicitors on the 27th November, 1953 long before the appearance was entered setting out the main lines of the judgment and specifically mentioning the two Indentures which are not actually mentioned in the Writ. The applicant's attendance at the hearing of the issues was not compulsory and there was certainly nothing compulsory about the settlement of those issues.

For all these reasons I must refuse either to set aside or to vary the judgment and the application must be dismissed with costs. The question of a certificate for two Counsel has already been raised and I will deal with this after hearing further argument thereon.

Application dismissed.

Solicitors: *Presgrave & Matthews; G. H. Goh.*

CHINESE TIN MINES REHABILITATION LOANS BOARD v. OFFICIAL ASSIGNEE, F.M.

[O. C. J. (Thomson J.) April 19, 1956]

[Ipoh — Originating Summons No. 18 of 1956]

Bankruptcy Enactment, s. 9(ii) — Whether secured creditor in bankruptcy, who does not prove, is entitled to interest after the date of the receiving order.

In this case the Chinese Tin Mines Rehabilitation Loans Board had made advances to the bankrupt amounting to $75,050 and by way of security the bankrupt had granted a Bill of Sale in respect of certain chattels and a charge over his interest in certain mining leases. The Board did not prove their debt in bankruptcy but after the receiving order was made they took proceedings to realise their securities and asked that they be allowed to retain out of the proceeds the amount due to them at the date of the receiving order together with interest up to the date of payment to them. The Official Assignee claimed that the Board were only entitled to the amount due at the date of the receiving order and were not entitled to recover from the proceeds of sale interest which has accrued since that date.

Held: there is no reason either on authority or on principle why a secured creditor who does not prove should be deprived of the interest which the law and his contract allow him.

Cases referred to:—

(1) *Moor v. Anglo-Italian Bank* 10 Ch. D. 681, 690.
(2) *Quartermaine's Case* (1892) 1 Ch. 639.
(3) *Ex parte Lubbock* 4 De. G.J. & S. 521.
(4) *In re Savin* L.R. 7 Ch. 760, 763, 764.
(5) *In re Pearce* (1909) 2 Ch. 492, 504.
(6) *Ex parte Johnson* 3 De. G.M. & G. 218, 236.
(7) *In re Fox & Jacobs* (1894) 1 Q.B. 438, 442.
(8) *White v. Simmons* L.R. 6 Ch. 555, 558.

ORIGINATING SUMMONS.

S. B. Coates for the applicant.

S. J. Sivaprasagam for the respondent.

Thomson J. : — This is an application by the Chinese Tin Mines Rehabilitation Loans Board for the sale of certain securities which they hold for money lent by them in pursuance of their statutory powers to one Khoo Heng Phoe, now deceased, to whom I shall refer as "the bankrupt".

In 1948 the Board made advances to the bankrupt amounting to $75,050 and by way of security he granted a Bill of Sale in respect of certain chattels and a Charge over his interest in certain mining leases.

From time to time payments were made in respect of the principal amount of this loan and in respect of interest on it, but on 13th October, 1952, a receiving order in bankruptcy was made in respect of the bankrupt's estate and the same day he was adjudicated bankrupt. On 27th December, 1952, he died but I do not think that fact has any bearing on the question at issue in the present case.

At the date of the receiving order there was still a fairly substantial amount owing to the Board in respect of the loan but they took no steps of any nature whatsoever to prove in the bankruptcy. Now they are taking proceedings to realise both their securities and have asked that they be allowed to retain out of the proceeds the amount due to them at the date of the receiving order together with interest calculated in accordance with the terms of Ordinance No. 9 of 1947 up to the date of payment to them. To these proceedings they have joined as respondent the Official Assignee as trustee of the bankrupt's estate. The Official Assignee has not opposed the application for sale but claims that out of the proceeds the Board are only entitled to the amount due as at the date of the receiving order and are not entitled to recover from the proceeds of sale interest which has accrued since that date.

The position is perfectly clear. The bankrupt borrowed $75,050 from the Board and he agreed to repay that sum and to pay interest on the outstanding balance of it from time to time at the rate of 3 per cent per annum, such interest to be compounded half-yearly. These obligations on the part of the bankrupt are perfectly clear and are in no way affected by security having been given. At the date of the receiving order the amount due was $X (the exact figures will have to be ascertained on inquiry) and nothing having been paid since then the amount is now $X + Y, $Y being the amount of interest that has become due since